



THE ATTORNEY GENERAL OF TEXAS

AUSTIN 11, TEXAS

PRICE DANIEL
ATTORNEY GENERAL

August 3, 1948

Hon. Howard Granberry, M.D.
Chairman, State Board of Health
Austin, Texas

Opinion No. V-646
Re: Authority of State Board
of Health to rescind a
regulation of State Health
Officer.

Dear Dr. Granberry:

Your opinion request states that in September, 1939, pursuant to Articles 4465A and 4466, the State Health Officer promulgated rules regulating the manufacture of ice cream. On June 1, 1948, he issued revised regulations which provide that:

"Ice cream is a clean, frozen, dairy product made from cream, milk or milk products, and sugar, with or without a harmless flavoring and with or without eggs or egg products, and contains not less than 8 percent of milk fat and may contain one-half of one percent of harmless stabilizer and shall not contain any fats or oils other than milk fat, and shall weigh not less than 4.5 pounds per gallon."

There are variations for "fruit ice cream" and "nut ice cream" which are not relevant here.

On June 14, 1948, the State Board of Health repealed the State Health Officer's regulation of June 1, 1948, and issued the following in its place:

"All ice cream shall contain not less than 8 percent butter fat and not less than 4 percent vegetable fat if vegetable fat is added, and that all ice cream manufactured, whether under the new process or the old process, shall state on the label just what it contains and the percentage of each."

Your question is:

"Was the action of the State Board of Health a valid procedure, and if not, are the regulations issued by the State Health Officer as of June 1st 1948 the present official regulations?"

The respective duties of the State Board of Health (called the Board) and the State Health Officer are created and defined by Acts of the Legislature. By Article 4414a, the State Department of Health consists of the State Board of Health and the State Health Officer.

The Health Officer is employed by the Board. It has the power to remove him for cause after notice and hearing. The Board is authorized to investigate the work of the State Department of Health, and is empowered to adopt rules for its own procedure. Art. 4418a. The Board is given general supervision and control "of all matters pertaining to the health of the citizens of this State." It is empowered to make studies, inspections, and investigations. It is given control over sanitary and quarantine measures, and has many similar powers. Arts. 4419-4421. But it is nowhere authorized to promulgate rules such as are here involved, nor to repeal any regulation duly issued by the Health Officer.

The Health Officer, on the other hand, is expressly empowered by the Legislature with rule making power. Thus Article 4466 provides that he shall:

"Make, publish and enforce rules consistent with this law, and adopt standards for foods, food products, beverages, drugs, etc. . . ."

By way of contrast, with reference to the internal management of the Department, Article 4418d provides that:

"He (the Health Officer) shall have the power, with the approval of the State Board of Health, to prescribe and promulgate such administrative rules and regulations . . . as may be deemed necessary for the effective performance of the duties

imposed by this or any other law upon the State Department of Health and its several officers and divisions."

You are therefore respectfully advised that under the respective powers given by the Legislature, the Health Officer is authorized to promulgate rules and adopt standards for food and food products. The State Board is not authorized to repeal such regulations or to promulgate its order of June 14, 1948. Assuming that the regulations of the Health Officer of June 1, 1948, are in other respects valid, they constitute the present official regulations on the subject.

SUMMARY

The State Board of Health is not empowered to repeal a health regulation of the State Health Officer duly issued under Article 4466.

Yours very truly,

ATTORNEY GENERAL OF TEXAS

Joe R. Greenhill
By

Joe R. Greenhill
Executive Assistant

JRG:erc

APPROVED:

Price Daniel
ATTORNEY GENERAL